RG:0023

University of Hawaii at Manoa

Environmental Center
Maile Bldg. 10 • 2540 Maile Way
Honolulu, Hawaii 96822
Telephone (808) 948-7361

Office of the Director

THE STATE ENVIRONMENTAL IMPACT STATEMENT ACT
AND THE REGULATIONS OF THE ENVIRONMENTAL QUALITY COMMISSION

Statement for the Senate Committee on
Ecology, Environment and Recreation
Public Hearing, 21 October 1975

By Doak C. Cox, Environmental Center
Jacquelin Miller, Environmental Center
and Ray Tabata, Sea Grant

Introduction

The present State Environmental Impact Statement System was established in accordance with Act 246 of the 1974 Legislature, now Chapter 343 of Hawaii Revised Statutes [HRS]. The Act called for the creation of an Environmental Quality Commission and required the Commission to adopt rules pertinent to its own procedures and regulations to be followed in the operation of the system. The Regulations (EQCR) did not become legally effective until 2 June 1975, but the preparation of Environmental Impact Statements [EIS's] in accordance with their provisions began some months earlier. The effectiveness of the Act and the Regulations can therefore, be appraised on the basis of considerable experience.

The Environmental Center of the University of Hawaii has, from its establishment in 1970, been concerned with the operation of EIS systems. It began reviewing federal EIS's prepared in accordance with the provisions of the National Environmental Policy Act [NEPA], and enlarged its review activities to include EIS's produced in the first State system under an Executive Order of the Governor in 1971 and the present State system under Act 246. In addition the Center has reviewed a considerable number of bills in which State systems were proposed, Act 246 itself, and the Rules and Regulations of the EQC. The comments, recommendations, and suggestions in this statement are based on this experience.

Although this statement is based on the EIS experience of the staff of the Center and a number of additional members of the University community who reviewed a draft, the statement does not represent the institutional position of the University.

Without question the EIS system established by Act 246 is a viable and useful system. It is assumed, therefore, that the interest of the Senate Committee on Ecology, Environment and Recreation relates especially to ways in which its effectiveness might be improved. The suggestions for improvements in this statement relate to the objectives of the system, the criteria for requiring EIS's, classes of action exempt from EIS requirements, the consultation process in EIS preparation, coordination of the EIS processes, provisions for supplemental EIS's, provisions for appeals, and the place of environmental analysis in planning.

Objectives

The successes and failures of the State EIS system should be judged in the light of its objectives. With respect to the specific goal of establishing a system for environmental review, the EIS Act has clearly been successful. With respect to its broader aims, improvement of the system seems possible.

No statement of objectives is included in Act 246 or the bill for this Act [HB 2067-74, HD 1, SD 1, CD 1]. However, the Conference Committee reporting on this bill identified its purpose as the establishment of "a system of environmental review at the State and County levels which will ensure that environmental concerns are given appropriate consideration in decision-making along with economic and technical considerations" [Conf. Comm. Rept. 27, 1974], and this purpose is reflected in the EQC Regulations [EQCR 1:2].

Among the objectives of the system, it seems useful to distinguish goals, which the system is expected actually to achieve, from broader aims, whose furtherance is intended but which cannot be achieved by the system alone. The purpose of establishing a system of environmental review is a goal achieved by the Act. Ensuring that environmental concerns are given appropriate consideration is a broader aim. What is appropriate in this context is surely suggested by the State Environmental Policy Act which, like the Act 246, resulted from recommendations of a Temporary Commission on Environmental Planning and was passed at the same session of the Legislature. This Act established conservation of resources and enhancement of the quality of life as aims to be furthered by all programs and authorities of the State [HRS 344-3]. Conservation is appropriately regarded as the combination of preservation and wise use. Hence in the broadest sense, the aim of Act 246 would seem to be to further environmental conservation in the context of overall and long-term human welfare.

The recommendations and suggestions presented in this statement relate to means by which the effectiveness of the system might be improved in relation to the broader aims.

A first suggestion is:

That the Legislature consider amending Act 246 to include not only the goal expressed in the Conference Committee report and the EQC regulations, but the broader aim of furthering environmental conservation in the context of overall and long-term human welfare.

Criteria for requiring EIS's

Provisions of Act

Clearly an important distinction to be sought is that between actions for which EIS's are required and those for which they are not. Quite appropriately, the Act establishes principles by which the distinction is to be made, substantively and procedurally, and leaves it to the EQC through its Regulations to fill in the details.

Two kinds of judgments are prescribed in the Act for making the distinction. One relates to the probability that actions will have significant environmental effects. The other relates to characteristics of the actions. The characteristics on which the EIS requirement is based are different for governmental actions and private actions. Government actions are subject to the requirement only if they will use state or county lands or funds [HRS 343-4(a)(1)]. Private actions are subject to the requirement only if they fall within one or more of five classes, defined by geographic or administrative criteria. With some simplification these classes are constituted by actions that will [by HRS 343-4(a)(2)]:

A. Use conservation lands

B. Use the shoreline area

C. Use a historic site

D. Use lands in the Waikiki-Diamond Head area

E. Require amendment of a county general plan

The following subsections of this statement relate to a discrepancy between the scope of the EIS requirement in the Act and the scope of the means prescribed to implement the requirement, a loophole in the impact probability criterion, an administrative limitation to the EIS requirement for private action, and a limitation to one of the geographic classes of private actions subject to the requirement.

Scope of EIS requirement vs
scope of prescriptions for implementation

In the case of certain actions, Act 246 requires EIS's without actually providing for means to implement the requirement. Either the scope of the requirement should be restricted or the scope of the provision for implementation should be expanded so that the requirement and means are compatible.

An EIS is required for an action if the action will probably have significant environmental effects [HRS 343-4(a)(1) and (a)(2)(A thru E)]; and if it falls within one or more of the classes of action previously mentioned.

Means for implementing the EIS requirement in the case of a government action are prescribed in HRS 343-4(b) and means in the case of a private action are prescribed in HRS 343-4(c). In the case of the private action, however, the prescription is limited to an action "which requires the approval of an agency." An agency is defined as "any department, office or board or commission of the State or county government which is a part of the executive branch of that government" [HRS 343-1(3), EQCR 1:4c].

No means for implementation are prescribed in the case of a private action that does not require the approval of such an agency, even if the action will probably have a significant environmental effect and it will be carried out in conservation lands, the shoreline area, a historic site, or the Waikiki-Diamond Head area, and will require an EIS.

The EQC regulations incorporate the need for an agency approval among the criteria for determining EIS requirements for private actions [EQCR 1:20]. They thus reduce the scope of EIS requirements so that it is compatible with the scope of means for implementing the requirement. However, the EIS requirement for private actions is, thus, narrower in the Regulations than under the Act.

It may be assumed that:

a) Means of implementing the EIS requirement should be provided for every type of action requiring an EIS under the Act and the Regulations.

b) The Act and the Regulations should be in agreement as to the extent of the requirement.

It seems sensible that the requirement of EIS's for private actions should be limited to actions for which some sort of governmental approval is required. Hence it is recommended:

That the Act be amended to incorporate in Section 343-4(a)(2) the same limitation to actions requiring agency approval as appears in section 343-4(c).

The introduction to Sec. 343-4(a)(2) could read, for example: "Any action that requires approval of an agency and that falls within any of the classes of action specified below . . ."

Impact-probability criterion
for requiring EIS's

A loophole in the EIS requirement for actions that may have significant environmental impact is provided in the wording of Act 246 relating to the probabilities of such impacts as criteria for the requirement. It must be recognized that a significant impact may not be recognized until an analysis has been made. If the analysis is not undertaken unless a significant impact is known in advance, the impact cannot be recognized. How certain it must be that significant impacts will occur or not occur before an EIS should be required is, thus, critical.

It does not seem generally recognized that the Act and the regulations actually separate actions (those which fall within one or more of the governmental or private classes previously mentioned) into three sets on the basis of differing probabilities of significant impacts. One set easily recognized is comprised of those actions "which will probably have significant effects" [HRS 343-4(1) and (2)(A thru E)]. For this set EIS preparation is mandatory.

An easily recognized second set is defined by the lists of "classes of action. . . which . . . will probably have minimal or no significant effect on the environment" that EQC was mandated to establish [HRS 343-5(6) and (7)]. The mandate has been met in the form of an overall list compiled by EQC itself [EQCR 1:33a], modified by certain qualifications [EQCR 1:33b], and detailed in lists compiled by agencies subject to EQC approval [EQCR 1:33d]. The members of this set of actions "shall be exempt from the preparation of a statement."

The third set is not generally recognized, it is comprised of those actions which "may have a significant effect on the environment" but do not fall within the first set. For an action in this set a significant impact is possible, but cannot be considered probable without analysis. For a government action in the set, a proposing agency may require of itself the preparation of an EIS [HRS 343-4(b); EQCR 1:31a]; and for a private action in the set, an approving agency may require the preparation of an EIS by the applicant [HRS 343-4(c); EQCR 1:22a, 1:23a and 1:31a].

To recapitulate, if before analysis of the effects of an action:

i. It seems probable that there will be a significant impact, EIS requirement is mandatory;

ii. It merely seems possible that there will be a significant impact, EIS requirement is optional, and

iii. It seems probable that there will not be a significant impact; EIS requirement is prohibited.

On general grounds it may be argued that only two sets of actions need be recognized, those for which EIS's are required and those for which they are not. Experience with the effects of the Act indicates that only one impact probability criterion is needed, and that criterion should be that the action may have a significant impact. Only proposing agencies in the case of government actions and approving agencies in the case of private actions have the powers to distinguish actions that will probably have significant effect from those that may have significant effect; those agencies will make most of the distinctions between actions that may have significant effect and those that probably will not, and those same agencies will make the final decision whether EIS's will be required or not. Unless it is petitioned for a ruling, the EQC has powers only to establish the list of classes of action for which EIS's will not be required because no significant effect is probable. Hence, it might be suggested that Act 246 be amended to reduce the three sets of classes of actions to two--those that will require EIS's and those that will not.

The actual assignments of actions among the three sets since Act 246 has been implemented indicate that the change should be recommended and not just suggested. The record of assignments also bears on the choice of the criterion on which the decisions should be based.

In practice, as might be expected, proposing agencies have tended to exempt their own actions from EIS preparation in case of doubt, either by class through their lists of categorical exemptions, or by individual determinations that EIS's are not necessary. Their lists of categorical exemptions include actions for which

they are approving agencies as well as those which they approve. Hence the tendency has affected private actions as well as government actions. The tendencies can be documented from the Environmental Center experience in reviewing individual and class decisions as to exemptions from EIS preparation requirements.

It should be recognized that, for an action not on an exempt list, the screening process begins with an assessment required by Act 246 [HRS 343-4(b) and (c)]. The assessment process has been formalized in the EQC Regulations and results in either a Negative Declaration or an EIS Preparation Notice [EQCR 1:31c]. The assessment should be expected to indicate in general what kinds of impacts are most likely to result from the action. The degree of probability of these impacts and their significance are, however, matters to which the EIS itself should be addressed, and impacts not identified in the assessment may very well come to light in the processes of preparation and review of the EIS. Hence, whether a significant impact probably will or probably will not result from an action cannot satisfactorily be determined until the EIS is prepared, and the basis of the requirement for EIS's to actions for which significant impacts are previously known to be significant is a serious limitation to the system.

It should also be recognized that even an initial assessment is not required in the case of an action categorically exempted. The Regulations provide that "all such exemptions . . . are inapplicable when the cumulative impact of planned successive actions of the same type, in the same place, over time is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment" [EQCR 1:33b]. There is, however, no effective mechanism by which actions on an exempt list will be examined as to potential cumulative effects or particularly sensitive environments.

Reluctance to extend the requirements of the EIS system seems clearly to have two bases. One is the confusion between EIS acceptance and action approval which is discussed elsewhere in this statement. The other is the mistaken concept that an EIS is necessarily a lengthy document involving considerable expense and time to prepare. The requirements as to the extensiveness and detail of an EIS should actually relate to the gravity of the impacts that may possibly result from an action. A simple assessment that indicates that significant effects are quite improbable from any particular action could be considered an acceptable EIS just as well as the basis for a Negative Declaration. There is therefore no valid reason for not requiring an EIS when there is doubt whether a significant impact may result from an action.

It is therefore recommended:

That Act 246 be amended so that EIS's will be required for actions that may have significant impact and not merely those that will probably have significant impact.

Agency-approval criterion for requiring EIS's

As indicated above, EIS's may not be required under the EQC regulation for a private action unless the action requires an agency approval, and the same limitation is recommended in Act 246. As also indicated above, the requirement is further limited by the definition of an agency as a part of the executive branch of the government. The agency-approval criterion for requiring EIS's may be improved by adding to Act 246 a definition of approval, but a definition somewhat different from that adopted by the EQC.

The EQC Regulations define approval as "a discretionary consent, sanction, or recommendation required of an agency prior to actual implementation of an action, as distinguished from a ministerial action" [EQCR 1:4g]. This definition: *i)* helps to clarify the distinction between project approval and EIS acceptance, *ii)* clarifies the EIS requirement in counties in which certain approval agencies are only advisory, but *iii)* inappropriately limits the EIS requirement by the exclusion of actions requiring only what are considered ministerial approvals.

Considerable confusion has arisen because the judgment as to the acceptability of an EIS has been considered by some to be essentially identical to the judgment whether or not the project to which it pertains should be undertaken. It seems often assumed that it is necessary that an EIS on a private project disclose no very significant adverse impacts for it to be approved by an agency having approval powers or that an EIS on a government project disclose no very significant adverse impacts if it is to be undertaken by the proposing agency. The effects of the confusion aggravate the tendencies of both applicants and proposing agencies to minimize the disclosure of adverse impacts in the EIS's for whose preparation they are responsible. The EQC definition of approval may reduce the confusion, but rewording to provide greater clarification seems possible.

A more important benefit stems from the inclusion of an agency recommendation as a form of approval in the EQC definition. In some counties the Planning Commission is only advisory, and the County Council must pass on such matters as zoning changes and amendments to general plans. County Councils may override the recommendations of Planning Commissions and Planning Departments and even the vetoes of Mayors. However, the EQC's definition of approval in the Regulation will make a project subject to the EIS requirement if the project must be submitted to a Planning Department or Commission for its approval, even if the approval or disapproval is merely advisory and hence considered a recommendation.

To clarify the distinction between action approval and EIS acceptance, and more importantly to assure that the EIS requirement extends to actions approved by agencies having only advisory powers, it is recommended that:

Act 246 be amended to define approval as a consent, sanction, or recommendation that pertains to an action and that is required of an agency before the action is actually implemented.

The EQC definition of approval seems to limit EIS requirement provisions undesirably in its restriction of approval to discretionary decisions rather than ministerial decisions.

The Building Department of the City and County of Honolulu recently took the stand that the issuance of a building permit constitutes a ministerial rather than discretionary approval, and that an EIS cannot be required for a private action requiring only a building permit even if the action may have a significant environmental effect and the action is in the Waikiki-Diamond Head area. The Attorney General has subsequently ruled that the EIS requirement does apply in the particular case at issue. In general, however, the applicability may still be unclear.

It seems questionable that an action should be exempt from the EIS requirement merely because the only agency approval required for it is regarded by the agency as ministerial.

It is therefore suggested:

That the Legislature indicate to the EQC, by resolution, that an agency approval subjecting an action to the EIS requirement need not be one considered as discretionary.

EIS requirement for coastal actions

The EIS requirement for private actions in coastal areas is, in Act 246, restricted to projects that are undertaken in the area between the shoreline setback line and a line 300 feet seaward of the shoreline, unless they will also be within the conservation land-use district, in a historic site, or in the Waikiki-Diamond Head area [HRS 343-4(a)(2)]. The shoreline setback line is only 20 to 40 feet inland of the shoreline, and the area seaward of the shoreline is within the conservation land-use district. Hence the special EIS requirement is identified only with a strip 20 to 40 feet wide. The restriction seems quite inconsistent with the provisions of the Shoreline Protection Act of 1975.

This Act (Act 176, 1975) relates to a Special Management Area (SMA) extending inland at least 100 yards from the shoreline. A special permit system must be instituted in each county for developments within the SMA, and the principal questions to be considered in granting the permits are environmental questions of the sort to which EIS's are intended to be addressed. Yet an EIS is not required by Act 246 for SMA developments except as they are in the Conservation district, in the shoreline setback area, a historic site, or in the Waikiki-Diamond Head area. Recognizing the need in SMA permit systems for the kind of information that EIS's would provide, the City and County of Honolulu is proposing to incorporate a County EIS requirement in the ordinance establishing its SMA procedures. Other counties may adopt similar requirements. The need is, however, statewide.

The scheduling requirements of the State EIS system will make it difficult for the counties to mesh these requirements with the requirements associated with SMA permits and other approvals. However, satisfactory meshing is possible (Special Management Area Boundaries and Guidelines under the Shoreline Protection Act - Univ. Haw. Environ. Ctr. SR:0009, 13 Sept. 75, pp. 44 et seq.). Hence it is recommended:

> That the geographic requirement in private-action EIS's, which is in Act 246 now related to the shoreline area and 300 feet seaward of it, be amended to relate to the Special Management Areas established in each county pursuant to Act 176 (1975).

Exemptions

Essentially all human actions have environmental effects, but the impacts of by far the greater number of actions are of negligible significance in the context of an EIS system. Provisions for categorical exemptions from EIS requirements are entirely appropriate. The provisions in Act 246 for such exemptions consist of two subsections mandating the EQC to establish the lists of classes of action which "shall be exempt from the preparation of a statement" to which reference has been made in the discussion of the EIS requirements. As implied in that discussion, the interpretation of these subsections by EQC and other agencies leaves much to be desired. It is the purpose of this discussion to indicate how improvements may be made, and to call attention to a minor unproductive redundancy in the Act.

Unnecessary redundancy

Both of the two subsections of the Act that provide for lists of classes of action to be exempted use the criterion that the actions "will probably have minimal or no significant impact" [HRS 343-5(6) and (7)]. Other than a minor typographical error [the omission of (a) in the citation of Sec. 343-4(a)(2) in Sec. 343-5(7)], the subsections differ only in that the second pertains to actions "which provide essential public services." Actions to which this second subsection pertains are included entirely in the first subsection. No further clarification is added by the redundancy. Hence if any amendment of Act 246 is undertaken it is recommended:

> That Act 246 be amended to delete the second subsection [of 343-5(7)] pertaining to lists of classes of action to be exempt from EIS requirements.

Classes exempt by EQC

As has probably become apparent from the discussion of EIS requirements, the problems of distinguishing between actions which as a class should be categorically exempt from EIS considerations, actions which individually by assessment should be exempt from full-scale EIS preparation, and actions for which EIS preparation should be required are difficult ones. As provided in the EQC regulations, the

listing of classes of action to be exempted from EIS consideration, mandated by Act 246, consists of a general list prepared by EQC [EQCR 1:33a], with certain exceptions noted by EQC [EQCR 1:33b] and subject to amendment [EQCR 1:33c]; more detailed lists mandated to be developed by agencies subject to EQC approval [EQCR 1:33d]; and the general class of emergency actions [EQCR 1:33f]. In principle the approval is wise, and with few exceptions the provisions in the regulations themselves are appropriate.

The major exception is in the inclusion of topographical features with existing structures, facilities, and equipment for which maintenance is exempt [EQCR 1:33a.1]. Topographical features are natural features subject to natural change. An interference with a natural change is just as much an environmental impact as is an inducement of a change to a natural feature. In some cases the artificial maintenance of a topographic features is appropriate--in other cases it is not.

Outstanding among such features whose artificial maintenance is attempted are beaches. No listing of examples seems necessary to indicate that some beach maintenance activities are successful but some have highly significant undesirable environmental impacts. Categorical exemption of beach maintenance operations from EIS requirements is quite inappropriate.

The recognition of exceptions to the general classes of exemptions reduces the inappropriateness of the present exemption of maintenance of topographic features, but not sufficiently. Together with the cumulative effects of successive actions, the undertaking of an action "in a particularly sensitive environment" constitutes an exception to the exemption [EQCR 1:33b]. However, the need for maintenance of a beach stems from its susceptibility to change, hence every beach requiring maintenance must be considered to be in a sensitive environment. It can be interpreted that only extreme beach maintenance needs indicate a particularly sensitive environment, and most beach maintenance activities, even though they have significant environmental effects will be exempted.

Similar arguments can be made in the case of other natural features such as stream banks and flood plains. It cannot be represented that maintenance of natural features is necessarily undesirable, but only that the environmental impacts of each program of maintenance of a natural feature should be analyzed, as is required in the preparation of an EIS.

It is recommended:

That the Legislature, by resolution, request that the EQC delete the maintenance of natural features from its list of categorical exemptions from EIS requirements.

Types of action exempt by agencies

Probably the gravest inadequacies of the State EIS system relate to the lists of types of actions to be exempt that are compiled by agencies under the provision of the EQC regulations. This provision specifically requires that these lists must be "consistent with both the letter and intent expressed in these exempt classes [established by EQC] and Chapter 343, Hawaii Revised Statutes" [EQCR 1:33d]. The inadequacies may stem from the fact that no agency has or can be expected to have adequate broad internal environmental competence and the tendency of each agency to promote its own programs and hence to minimize the disclosure of environmentally detrimental impacts of those programs. To the extent the lists have been approved by the EQC, the inadequacies may stem from limitations of staff and funds of the EQC, inadequate consultation with other agencies having environmental competence, or simply insufficient provision or attention to review. It should be noted that the burden on the EQC is great. In September 1975 alone, 206 classes of action were submitted for exemption approval to the EQC.

For the purposes of discussion it seems desirable to distinguish between three sets of types of actions:

i) Types of actions that can obviously without more than the most cursory assessment be regarded as having, without exception, no significant environmental impact.

ii) Types of actions that can be found by assessment to have, without exception, no significant environmental impact.

iii) Types of actions that can be found by assessment to have, no significant environmental impact generally, but including a few actions that may have a significant impact.

There is, of course, no concern with the types of the first set. Common sense indicates that an exhaustive search for and listing of these types would be unproductive. The distinction between the second and third sets is, however, important. Careful assessment will be necessary to determine which particular actions may have significant environmental effects within a class which in general would not have such effects.

The EQC regulations do not call for any assessment of a class of actions proposed for categorical exemption from the EIS requirements. Even assessments carried out under the EQC provisions would be limited in their utility. These provisions, restricted to individual actions require documentation and notice of determination, but leave optional the public distribution and review of the documentation [EQCR 1:31].

In practice the exemption lists submitted by some agencies have been published and approved without even identifying which general EQC exemption class justifies the exemption of each listed type of action [eg. exemption lists proposed by State

Dept. of Transp., City and County Dept. of Transp. Serv., and County of Hawaii: EQC Bull. 8 Sept. 75]. The lists lack any indications of the location, scope, duration or intent of the actions proposed for exemption. The lists include indescriminately action types of the first set that should questionably be considered at all [eg. litter container pickups, window modification], types of the second set that should be considered but probably in their entirety should be exempt, types of the third set that clearly include actions that should not be exempt [eg. chemical control of vector] and even of actions that should generally be subject to specific individual assessment [eg. sand replenishment to existing beaches, releases and recoveries (of plants and animals)].

It should be especially noted that although the EQC has provided for exceptions to the exempt classes [EQCR 1:33b], it has prescribed no means for implementing this provision, even in the case of an exemption to its own list of classes.

The inadequacy of the present exemption could be remedied without amendment of Act 246 and solely by the use of procedures already provided in the EQC regulations.

As already indicated, the assessment procedure [EQCR 1:30] could effectively be used to screen the exemption lists proposed by agencies. The definition of assessment [EQCR 1:4h] would have to be revised to make the procedure applicable to types of actions proposed for exemption, and the assessment procedure should be prescribed in the provision for agency proposals for exempt classes [EQCR 1:33].

In addition to the assessment, an EIS might very appropriately be called for in the case of any type of actions for which the exemption decision is difficult, under the provision of the Act that "a group of actions may be treated by a single statement" as authorized by the Act [HRS 343-5(2)]. The EQC regulations now provide for EIS's for groups of actions in the case of both government actions [EQCR 1:12c] and private actions [EQCR 1:22a].

The exempt types would have to be carefully defined so as to exclude all actions that might have a significant impact or to identify those circumstances under which an assessment would be made for an individual action within the class. The provision in the Rules of the EQC [Subpart d] that "an interested person or agency" may petition the EQC for a "declaratory order on the applicability of any statutory provision or of any rule or regulation or order of the Commission" will allow for public challenge in case an action has been improperly exempted under the procedures described.

It is recommended:

That the Legislature by resolution call upon the EQC to apply its assessment procedures to the exemption types and classes proposed by agencies in the future, to use the provisions for group action EIS's in the case of difficult decisions as to exempt types or classes and review all exemption-type lists already approved using the same procedures.

Public input

Under the State EIS system the proposer of a project, government or private, has the responsibility for preparing the EIS on the project. This has a distinct advantage in the encouragement of close coupling between environmental analysis and project planning. A distinct disadvantage lies in the pro-project bias on the part of the project proposer. The effects of bias can be offset only in review by other agencies and the public. However, the time limits set for the review process in Act 246 and the EQC regulations limit the effectiveness of the review process.

The Act provides that, in the case of a private action, "The agency receiving the request shall, within sixty days of receipt of the statement, notify the applicant and the commission of the acceptance or non-acceptance of the statement [HRS 343-4(c)]. To provide maximum time for review within the 60 days, the EQC regulations permit formal receipt of the statement only twice a month, just before publication of the EQC Bulletin, and allow 30 days after publication for review. A period of 14 days thereafter is provided for response, leaving about two weeks for review by the EQC, if its recommendation is requested, and for consideration by the accepting agency. Although the Act does not require that the 60-day time limit be placed on the review of EIS's for government actions, the EQC has prescribed the same schedule for such EIS's. Whether the legislature intended so much to limit the time available for public review of an EIS as to limit the time available for its agency consideration is questionable. The disadvantages of the present time limitation have been alleviated by the EQC in its provision for a consultation period prior to EIS submission. However, in the case of government actions, the undesirable effect of the limitation could be eliminated by restricting the applicability of the EQC time limits to private actions.

Allowance of unlimited time for review would, of course, not be feasible. The 30 day limit for initial review is not unreasonable, even for the EIS on a government agency action. It is, however, undesirable that the public and other agencies be unable to comment on inadequate responses by a proposing agency to original review comments. There seems to be no reason why the proposing agency should not provide for a second round of review of an EIS if divergences of opinion have not adequately been reconciled in the first round. If the time limit for acceptance of private applicant EIS's is not changed, it is recommended:

> That the Legislature, by resolution, indicate to the EQC, the undesirability of applying to the review and response processes for government agency EIS's the same time limits that are required for private applicant EIS's.

Consultation

To reduce the undesirable effects of the time limits on the response and review imposed by the Act in the case of private EIS's and extended by the EQC to agency EIS's, the EQC Regulations provide for a kind of informal pre-filing review in the form of consultation with appropriate agencies, citizen groups, and individuals [EQCR 1:41].

The success of this provision seems limited by inadequate specifications as to the information to be submitted to the appropriate groups and individuals for their consideration. If the consultation is effectively to substitute for some of the interchange that must otherwise occur during the formal review process, the information submitted should represent as nearly as possible the contents that will be required in the EIS, but the regulations require only the submission of the EIS Preparation Notice and a request for consultation [EQCR 1:41a].

The limitation particularly affects the extent to which the Environmental Center can contribute to the consultation process on an EIS. If the Center were to respond to a request for consultation accompanied only by a preparation notice, it could quite legitimately be accused of undertaking work that could be undertaken by a paid consultant. Only recently has the Center received requests for consultation accompanied by documents representing so nearly complete EIS's that it has considered consultation appropriate.

If the time limits for EIS acceptance in the Act are not modified, it is suggested that:

> The Legislature amend Act 246 to incorporate the EQC's provisions for "Consultation prior to filing" but requiring that a document submitted for consultation address essentially the same subjects as those listed as required in an EIS; or
>
> That the Legislature by resolution advise EQC to incorporate such a requirement as to content in its provisions for "Consultation prior to filing EIS."

Application of time limit

It may be that the 60-day time limit imposed on the review, response, and acceptance of an EIS on a private action was actually intended to apply to the consideration of an agency whether an EIS, already reviewed and revised was acceptable or not.

If Act 246 were amended so that the time limit were to apply to the period after review and response, or even after review, the limit would present no problem. Indeed the time allowed could well be reduced to 30 days. Although pre-submission consultation would still be desirable, there would be no need for EQC's extensive provisions for the consultation process, no need for its amendment as suggested above. It is suggested:

> That Act 246 be amended to make the time limit for the consideration of an EIS for a private action applicable only to the period after the submission of the EIS as it has been revised on the basis of review and to reduce the time limit from 60 to 30 days.

Coordination

Prior to the implementation of Act 246, there was in effect a limited State EIS system, established by Executive Order of the Governor [August 23, 1971], that was applicable to actions that would use state lands or funds. In this prior system the Office of Environmental Quality Control [OEQC] had an important coordinating function not only in the mechanics of EIS review but in the decisions whether EIS's were required or not and, when prepared, whether they were acceptable or not.

Under Act 246 the entire EIS system has been decentralized. The EQC's role is limited to adoption of the Regulations under which the system operates, interpretations of the Regulations by petition, recommendations as to EIS acceptability upon request, reviews of non-acceptances upon appeal, and the provision of the means for public information.

State actions

It seems clear that the decentralization was deliberate in the case of the private actions that fall within the new system. It is not clear whether the elimination of the OEQC's coordinating role in relation to State actions was deliberate or not.

The Governor's Executive Order providing the OEQC with coordinating powers with respect to EIS's for State actions has not been rescinded. Whether or not it is still in effect, however, is questionable in the light of the passage of Act 246. If it is not in effect, the new State EIS system seems distinctly less effective with respect to State actions than the previous system. The EQC clearly does not have the coordinating responsibility with respect to State actions that the OEQC previously exercised.

It is recommended either:

That Act 246 be amended to restore to the OEQC the coordinating role that it had with respect to EIS's on State actions;

That Act 246 be amended to provide the EQC with that coordinating responsibility;

or

That the Legislature by resolution recommend to the Governor that OEQC's coordinating role be restored or reconfirmed

and

That any funds necessary to implement the coordinating role be provided.

County actions

It may well be that a County might wish to provide some county agency with coordinating powers in the handling of EIS's relating to actions proposed by agencies in that county similar to those previously exercised by the OEQC with respect to state agency actions. It is suggested that:

> Act 246 be amended to provide that a county may provide coordinating powers with respect to those EIS's that are subject to acceptance by the Mayor similar to those that were provided to the OEQC under the Governor's Executive Order.

Supplemental EIS's

Both Act 246 and the EQC regulations stress the importance of early address to the environmental impacts of an action [HRS 343-4(b) and (c); EQCR 1:30a, 1:40, and 1:60]. Preparation of an EIS early in the process of planning for a project will assure that broad aspects of environmental impacts will be disclosed early so that they may be taken into account and adverse aspects minimized during the planning process. Important environmental impacts of a project, however, may depend upon details of the project plans that have not been established early in the planning process. Some of the environmental impacts of a highway, for example, may depend critically upon the exact alignment of the highway and the extent to which it is constructed at grade, in cuts, and in fills, or on an elevated structure. An EIS prepared early in the highway planning process may, therefore, be unable to address adequately some of the environmental impacts.

In addition, with the passage of time, analytic capabilities related to environmental impacts may be expected to change and concepts of the significance of an impact may be expected to change. An EIS considered acceptable at one time might be judged unacceptable before the project to which it pertains is initiated if there is a lapse of several years between the date of EIS preparation and the date of project initiation even if the plans for the project had not changed.

The EQC regulations compensate reasonably well for the limitations associated with requiring an EIS early in the project planning process. They provide for the requirement of a supplemental EIS if the scope of the project is substantially increased, if the intensity of the impacts will be increased, if the mitigation measures originally planned are not to be implemented, or if "new circumstances or evidence have brought to light different or increased environmental impacts not previously dealt with" in the original EIS [EQCR 2:10].

Act 246 makes no provision for supplemental EIS's. Indeed it specifies that "A statement that is approved with respect to a particular action shall satisfy the requirement of the chapter and no other statement for that proposed action shall be required" [HRS 343-4(g)]. The EQC has attempted to reconcile its provision for supplemental EIS's with this specification on the grounds that an action, so modified in the course of the development of plans as to have significantly different impacts from those originally estimated, is an essentially different action from that originally proposed [EQCR 2:00].

The EQC provision for the requirement of supplemental EIS's is a wise one. It provides perhaps the only assurance a project will actually be carried out in conformity with the plans presented in an EIS. A mandate in Act 246 that a project must conform to its description in an EIS would be of doubtful effectiveness unless means were provided to enforce conformity and penalties were prescribed for failures to conform.

To avoid any challenge to the provision regarding supplemental EIS's in EQC's Regulations, it is recommended:

> That Act 246 be amended to provide that supplemental EIS's may be required if the impacts of an action will differ significantly from those estimated in the original EIS for the action because, for example, the plans for the action have been changed or developed in greater detail, or if, in the passage of a considerable interval of time between the preparation of the original EIS and the initiation of the action, impact analytic capabilities have been significantly improved or concepts of the significance of impacts have been significantly altered.

Appeals

Act 246 contains provisions for appeals to the EQC and to the courts. Discussed herein are possibilities for extending the provisions for appeal to the EQC, for enlargement of the scope of issues that are referrable to the courts, and for a minor change in standing in relation to specific issues.

Appeals to EQC

Act 246 and the EQC regulations provide that an applicant may appeal an agency's decision that his EIS is not acceptable [HRS 343-4(c); EQCR 1:80]. No provision is made for an appeal to EQC that an EIS has unjustifiably been accepted or that a Negative Determination or EIS Preparation Notice have unjustifiably been issued.

It would seem that the same rationale for granting an applicant the right to appeal an EIS non-acceptability decision would apply in the case of an EIS preparation notice which he considered unreasonable. In both cases the applicant may appeal to the courts, but in either the case of an agency's decision that an EIS is required or the case an agency's decision that an EIS is not acceptable, an applicant may appeal to the courts if he considers the decision unreasonable. It seems just as reasonable in the first case as in the second that his first recourse might be the EQC. An applicant presumably would never wish to challenge a decision that an EIS was not required or that an EIS was acceptable, but it would seem appropriate that another agency than the approving agency might appeal to the EQC in the case of a Negative Determination or EIS acceptance that it considers improper.

It is recommended:

That the provisions of Act 246 for appeal by an applicant to the EQC be extended to cover EIS Preparation Notices.

In addition it is suggested:

That the provisions of Act 246 for appeals to the EQC be extended to cover appeals on Negative Determinations and EIS acceptances from agencies other than the approving agency.

Issues referrable to the courts

Act 246 contains provisions respecting the initiation of judicial proceedings respecting several kinds of EIS-related issues (HRS 343-6).

a) *i)* A lack of determination that an EIS is or is not required for a proposed action not otherwise exempted.

ii) The undertaking of an action by an agency without determination that an EIS is or is not required.

b) The determination that an EIS is or is not required.

c) The acceptance or non-acceptance of an EIS.

This list of issues fails to include some that appear very similar to those included. The failure is perhaps not serious, because the list is presented in the Act merely as a base for establishing time limits for initiating judicial proceedings. However, it implies that proceedings cannot be brought in relation to other issues. If time limits for initiation of proceedings related to other issues seem as important as those recognized.

One specific omission from the list is an extension of a)*i)*: A lack of determination that an EIS is or is not required for a proposed action that has been improperly exempted, whether the exemption has resulted from improper interpretation of an exemption in the Act, or improper inclusion in or interpretation of EQC's exemption list [EQCR 1:33a] or an agency's exemption list [EQCR 1:33d].

A second omission is similar to a)*ii)*: The undertaking of an action subject to Act 246, whether by an agency or a private party, for which an EIS has been determined as required but for which no EIS has been prepared, reviewed, and accepted.

It is recommended:

That provisions be added to Act 246 covering judicial proceedings respecting:

i) A lack of determination that an EIS is or is not required for an action improperly exempt by interpretation of the Act.

ii) The undertaking of an action by a private party without assessment,

iii) The undertaking of an action for which an EIS has been required but for which no EIS has been accepted.

Standing in the courts

The extent to which standing to initiate judicial proceedings in relation to environmental issues should be limited is much debated. As brought to attention by the Temporary Commission on Environmental Planning in 1974, the states which have minimally limited standing have experienced no rash of court suits such as had been feared. Comments here do not relate to the broad question but are restricted to a particular limitation to the standing of persons provided in Act 246 that seems especially unwise and a further possible limitation to the standing of agencies.

In the case of a decision as to the acceptability of an EIS, standing is limited to affected agencies and to persons who will be aggrieved by the proposed action and who provided written comments in the EIS review, with the further stipulation that proceedings initiated by such persons must be limited to issues identified and discussed in their review comments [HRS 343:6(c)].

One of the major purposes of the review process is to assure that the significant environmental impacts of a project are identified. There is an inescapable bias that results from placing the responsibility for EIS preparation on the proposer of the project. This bias is quite likely to result in the intentional or unintentional omission of one or more significant impacts from the EIS as originally prepared. Impacts omitted may be of such nature that they are most likely to be disclosed in the review process by persons or agencies with either special geographic or special professional competence. A person potentially aggrieved by a project may be expected to have special geographic competence but cannot be expected to have professional competence pertinent to all of the possible impacts of the project. Hence, until the complete EIS is available, including the comments of all reviewers and the responses to these comments, a person may be quite unaware of a probable impact that would be a source of grievance to him. It is recommended:

That Act 246 be amended to eliminate the limitation that a person who has standing with respect to judicial proceedings by reason of a possible grievance may initiate proceedings with respect only to issues on which he has himself commented in the EIS review process.

As indicated above, the standing of an agency to initiate judicial proceedings is conditioned by the effect of the project on the agency [HRS 343:6(6)]. An agency having administrative responsibility for a particular environmental aspect that may be affected by the project is presumably an affected agency. It is not clear that the EQC may have standing as an affected agency.

To clarify the matter, it is recommended:

That Act 246 be amended to provide explicitly for the standing of the EQC with respect to judicial proceedings respecting the acceptability of EIS's.

Environmental analysis in relation to planning

EIS systems have been designed to relate to specific projects rather than to comprehensive and land-use plans. Act 246 specifically excludes from the actions requiring EIS's those "proposing new county general plans or amendments to any existing county general plan initiated by a county" [HRS 343-4(a)(2)(E)]. The exclusion is recognized in the EQC Regulations [EQCR 1:13]. Yet, surely in relation to the broad aims of the EIS system, the identification and analysis of the environmental implications of comprehensive and land use plans is as important or more important than the identification and analysis in the case of the individual projects that may be undertaken within those plans.

The content requirements for an EIS prescribed in the EQC Regulations [EQCR 1:42] appear entirely appropriate to the needs for identification and analysis of the environmental implications of a comprehensive plan, except that "The relationship of the proposed action to land-use plans, policies and controls for the affected area". [EQCR 1:42d] would have to be interpreted as referring to the relationship of the proposed plan to other plans.

The presentation of the environmental implications of a plan to the public, the provision for public review and comment, and the requirement for response to public comments that are integral parts of the State's EIS system seem clearly desirable. Although the procedures for adopting comprehensive and land-use plans do include these processes, actual practices suggest either that the requirements for their inclusion are not sufficiently extensive and explicit or that they are not adequately followed.

Of the provisions in Act 246 and the EQC regulations, the only ones that would seem particularly inappropriate in the development and adoption of comprehensive plans and major land-use plans are the time limitations. No time limits are actually imposed by Act 246 for actions that require EIS's because they will use state and county lands or funds, but the EQC regulations subject the EIS procedures pertaining to such actions to the same time limits as pertain to the public review and the response to review comments [EQCR 1:61-62] in the case of private action EIS's.

Some time limits to the opportunity for public review of proposed comprehensive plans and major land-use decisions at any particular stage may actually be desirable, and the important limitations may be in the provision in the present system for only one formal review and the time limit to the response period. It would seem advantageous in the case of these major plans and decisions to allow for much more extensive response to the public comments received in a review, for subsequent presentation for review of a revised statement of environmental impacts, and for repetitions of the review and response cycle until the major issues have been presented with clarify.

Assuming the time-limit problem can be resolved, the major argument against requiring EIS's for comprehensive plans and major land-use decisions would seem to be the fact that the judgment whether a particular plan should be adopted or not or a particular land-use decision should be made or not is much less clearly

separable from the judgment whether an EIS pertinent to the plan or decision is acceptable or not than in the case of a specific project and the EIS pertinent to it.

Our abilities to identify and analyze the implications of broad plans and major land-use decisions are much more restricted relative to the needs, than in the case of specific projects. Judgments as to the acceptability of statements on the implications of comprehensive and land-use plans are very nearly as subjective as the decisions whether or not to adopt the plans.

Surely, however, extensive and intensive efforts to identify and analyze the environmental implications of comprehensive and land-use plans is highly desirable. In recognizing that feasibility of planning studies are exempted by Act 246 from the EIS requirement, the EQC Regulations state that: "Nevertheless, if an agency is studying the feasibility of a proposal, it shall consider environmental factors and available alternatives and disclose such considerations in any subsequent statements" [EQCR 1:13].

It is suggested that:

The Legislature consider extending to the comprehensive and land-use planning processes of the State and counties the principles of environmental impact identification and analysis.

The extention should not be considered as requiring, overall, an unjustifiable increase in the amount of environmental analysis. The requirement for incorporation of procedures for such identification and analysis in the planning processes could in fact reduce significantly the amount of identification and analysis required on a case-by-case basis in relation to individual projects. Act 246 and the EQC Regulations recognize that: "Whenever an agency proposes to implement an action or receives a request for approval, the agency may consider and, where applicable and appropriate, incorporate by reference in whole or in part previous determinations of whether a Statement is required and previously accepted EIS's [HRS 343-4(e); EQCR 1:32]. The Regulations further provide that: "A group of proposed actions shall be treated as a single action when: (1) the component actions are phases or increments of a larger total undertaking; (2) an individual project is a necessary precedent for a larger project; [or] (3) an individual project represents a commitment to a larger project" [EQCR 1:12c and 1:22b]. The single action best treating a group of related projects is the adoption of the plan incorporating or implying the incorporation of the individual projects. The EQC Regulations already require in the contents of an EIS for a specific project a discussion of "The relationship of the proposed action to land-use plans, policies, and controls for the affected area" [EQCR 1:42d].

If specific address to the environmental implications of a comprehensive or land-use plan is required through amendment of the EIS Act it is recommended:

That Act 246 be further amended so that the present limitation to but one EIS for an action be modified so that a supplementary EIS may be required for any project undertaken under the plan if such a project may have environmental impacts differing in any significant way from those forseen when the plan was adopted.